No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

MARGARET F. BRANCH; RANDALL MANGOLD; CONNIE R. BRACKET,

Petitioners,

v.

MILTON E. NIX, JR.; GARFIELD HAMMONS, JR.; BETTY ANN COOK; EUGENE P. WALKER; J. MICHAEL LIGHT; JOE FERRERO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Ex Post Facto prohibit members of the Georgia parole agency from enforcing an unpublished ninety percent to serve policy foreclosing Petitioners from consideration for release on parole before serving de facto ninety percent of their sentences and without fair legal substantially increasing their sentences to serve beyond their likely release on parole in accordance with the enacted parole laws in effect at the time of commission of their offenses after serving one-third of their judicial sentences and the months to serve calculated under statutorily mandated Parole Decision Guidelines?

2. Does the retroactive application of an unpublished ninety percent to serve policy by the Georgia parole agency that substantially extends sentences to serve beyond the enacted parole laws and Parole Decision Guidelines without fair legal warning also violate Due Process?

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JURISDICTION

The final judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on November 30, 2004. The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a Writ of Certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE I. SECTION 9. No...ex post facto Law shall be passed.

ARTICLE I. SECTION 10. No State... shall pass any...ex post facto Law...

AMENDMENT V. No person shall be held to answer ... nor be deprived of life, liberty, or property without due process of law;

AMENDMENT XIV. SECTION I. ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

STATEMENT OF THE CASE

The statutory parole laws in Georgia provide for eligibility for parole after serving one-third of judicial sentences pursuant to O.C.G.A. § 42-9-45 (b) and the months to serve calculated according to the Parole Decision Guidelines pursuant to mandate of O.C.G.A. § 42-9-40 (a). The statutorily parole laws provide for denial of release on an objective determination on an individual basis that an inmate's release on parole would not be compatible with the inmate's own welfare or the welfare of society pursuant to O.G.C.A. § 42-9-42 (c). After a legislative attempt failed to enact a requirement that all violent offenders serve their entire sentences, in order to satisfy the 85% of judicial sentences to serve requirement of the Violent Offenders Incarceration – Truth In Sentencing Act ("VOITIS"), 42 U.S.C. § 13704, *et seq.* to qualify for federal grant funds to build new prisons, the Georgia State Board of Pardons and Paroles ("Board") adopted an unpublished resolution that all inmates in twenty violent and residential burglary offender categories must serve ninety percent of their sentences.

The sentencing laws in Georgia provide for very long sentences which are substantially longer than most states sentencing laws and guidelines because the statutory parole laws contemplate that deserving inmates will be released after serving one-third of their judicial sentences or the months to serve calculated under the Parole Decision Guidelines. Rather than reducing the sentencing periods as other states did in order to comply with the 85% requirement for funding pursuant to VOITIS, Georgia went the other way and required that inmates in seven most serious violent offender categories serve mandatory sentences without parole enacting O.C.G.A. § 10-10-6.1, but when a similar legislative attempt failed to increase sentences to serve for other violent felonies, the Board adopted and retroactively implemented an unpublished "policy" that all offenders in twenty other violent offense and residential burglary categories must serve ninety percent of

their judicial sentences before being eligible for release on parole.

This unpublished policy had an unpublished "effective date" of January 1, 1998, but the Board slavishly applied the ninety percent to serve policy retroactively to inmates whose offenses were prior to January 1, 1998 as well as prospectively to inmates whose offenses after that date to foreclose any parole until the inmates in the listed categories had served ninety percent of their sentences. On May 29, 2002 Judge William C. O'Kelley in *Coleman Jackson v. State Board of Pardons and Paroles*, United States District Court for the Northern District of Georgia, Civil No. 2:01-CV-068-WCO, held unconstitutional in violation of Ex Post Facto the retroactive application of the unpublished policy of the Board which substantially extended Georgia inmates' sentences to serve to at least ninety percent of their judicial sentences. (A-41). The Board did not appeal Judge O'Kelley's Order holding the retroactive application of the ninety percent to serve policy unconstitutional.

Petitioners whose offenses were after the unpublished "effective date" have had their sentences to serve substantially extended by the Board's ninety percent sentences to serve policy. The Petitioners have been de facto foreclosed from any consideration for parole and have continued to be illegally and unconstitutionally incarcerated in violation of Ex Post Facto and Due Process without fair legal notice beyond the time that they should have been released on parole under the enacted parole laws and the Parole Decision Guidelines in effect at the time of commission of their offenses. The testimony in *Coleman Jackson v. State Board of Pardons and Paroles*, supra, established that: "The staff of the Board automatically applied the ninety percent to serve rule to 8,664 cases from January 1, 1998 through June 30, 2001 and except for ten special prosecutorial deals, all inmates in the twenty categories were foreclosed from being considered for parole until they had served the ninety percent threshold." (A-36).

The Board's representative reaffirmed that of "at least" ten thousand inmates who have been put under the ninety percent to serve policy committing offenses after January 1, 1998 only eighteen had been paroled before serving ninety percent of their sentence and these most often involved prosecution deals. (Sullivan deposition, p-16).

The Petitioners, who are first time offenders with "excellent" Parole Success Likelihood Scores and no contention that their release would not be compatible with the welfare of society, have been and are continuing to be completely foreclosed from parole because the Respondents as members of the Board adopted and are continuing to slavishly follow a de facto ninety percent extended sentences to serve policy which has the effect of almost tripling their sentences to serve without any fair legal warning.

REASONS FOR GRANTING THE PETITION

The fundamental graveman is that the Respondents as members of the Georgia parole agency are violating protections of Ex Post Facto and Due Process by adopting and enforcing an unpublished ninety percent to serve policy thereby substantially extending sentences to serve to de facto ninety percent of judicial sentences before consideration for parole of the Petitioners as well as all inmates in twenty offense categories and without fair legal warning applying this unpublished policy to significantly increase the sentences to serve of Petitioners beyond their likely release on parole pursuant to the enacted parole laws providing for their likely release on parole after serving the statutory one-third threshold of their judicial sentences and the months to serve calculated pursuant to the statutory mandated Parole Decision Guidelines

There is a conflict in the Circuits as to whether the existing parole laws attach at the time of commission of an offense and whether existing parole laws can be subsequently

modified to offenders' detriment by policy or otherwise in violation of Ex Post Facto prohibitions. The Eleventh Circuit has ruled in the underlying case that the enacted parole laws existing at the time of commission of an offense can be modified by unpublished changes in policy of the Georgia parole agency. The Fourth Circuit in *Warren v. Baskerville*, 233 F.3d 204, 208 (4th Cir.2000) has held that a retroactive parole "policy" change "did not for ex post facto purposes have the force and effect of law."

The Third Circuit in *Mickens-Thomas v. Vaughn*, 321 F. 3d 374, 386 (3rd Cir. 2003) ruled the opposite that a parole agency must rely on the parole laws in place at the time of commission of the offender's crime and that new policies being applied against the offender's interest violate Ex Post Facto. The First Circuit in *Hamm v. Latessa*, 72 F.3d 947, 957 (1st Cir.1995) held that a retroactively applicable parole policy would constitute a "law" within the meaning of the Ex Post Facto Clause if it "possess[ed] the full force and effect of law...." The Fifth Circuit in *United States ex rel. Graham v. United States Parole Comm'n*, 629 F.2d 1040, 1043 (5th Cir.1980) instructed that any "official post-sentence action that delays eligibility for supervised release runs afoul of the ex post facto proscription." The Ninth Circuit in *Love v. Fitzharris*, 460 F.2d 383, 385 (9th Cir.1972) ruled that a parole board's retroactive interpretation of a parole eligibility provision was subject to Ex Post Facto constraints because the interpretation had the effect of law.

This Petition for Writ of Certiorari involves an important federal question which should be decided by the United States Supreme Court as to whether an unpublished policy of a state parole agency can without fair legal warning substantially increase the threshold for consideration and release on parole of Petitioners violates Ex Post Facto and Due Process protections of the United States Constitution.

I. THE APPLICATION OF THE NINETY PERCENT TO SERVE POLICY TO SUBSTANTIALLY EXTEND THE DURATION OF THE SENTENCES TO SERVE OF PETITIONERS VIOLATES EX POST FACTO PROHIBITIONS WITH NO PRIOR FAIR LEGAL WARNING OF THE INCREASED PUNISHMENT OVER EXISTING PAROLE LAWS AND GUIDELINES

The precedents of the United States Supreme Court in the cases of *Garner v. Jones*, 529 U.S. 244 (2000) and *California Department of Corrections v. Morales*, 514 U.S. 499 (1995) hold that retroactive actions relating to parole violate the Ex Post Facto prohibitions of the United States Constitution when the practical result of implementation of actions by a parole agency creates a significant risk of prolonging an inmate's incarceration. In both of these cases the United States Supreme Court ruled that a procedural change in the frequency of review for inmates serving life sentences did not necessarily violate the Ex Post Facto prohibitions. But relevant to the instant case in both of these cases the United States Supreme Court instructed that parole actions which retroactively increase the likelihood or sufficient risk of prolonging inmates' incarcerations would violate the Ex Post Facto prohibitions of the United States Constitution. It is patently obvious that the actions of the Georgia Board in applying the de facto ninety percent to serve policy to every inmates' existing sentence to serve significantly increasing the duration of their sentence to serve beyond the statutory parole thresholds for release on parole is retroactively increasing their punishment in violation of Ex Post Facto prohibitions.

This was the holding of United States District Court Judge O'Kelley in *Coleman Jackson v. State Board of Pardons and Paroles*, United State District Court for the Northern District of Georgia, Civil Action No. 2:01-CV-068-WCO (2002) which applied to the individual case of Coleman Jackson and he found that it was not necessary for this

"policy" to be a law or regulation, only that its "practical implementation" produces a "sufficient risk" of retroactively lengthening the inmate's period of incarceration. (A-30). The Respondents as members of the Board did not appeal Judge O'Kelley's Order and are now estopped to deny that the retroactive application of the ninety percent to serve policy does not violate the Ex Post Facto prohibitions of the United States Constitution.

The Eleventh Circuit decision stated that "the *sine qua non* of an ex post facto law is retrospective effect or application" (A-7), but more fundamentally Ex Post Facto protection is based on the lack of fair notice of extended governmental restraint increasing an inmate's punishment beyond that proscribed at the time the offense was committed. In *Weaver v. Graham*, 450 U.S. 24, 28 (1981) the United States Supreme Court developed the historical fair warning doctrine reasoning for the prohibition of Ex Post Facto: "Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." (Emphasis supplied). Citing *Dobbert v. Florida*, 432 U.S. 282,298 (1977); *Kring v. Missouri*, 107 U.S. 221, 229 (1883); *Calder v. Bull*, 3 Dall 386, 387 (1798). The Court then went on to instruct:

> "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and government restrain when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." *Id* at 30.

The Supreme Court then spoke to exactly what the Georgia Board has attempted to do in foreclosing the Petitioners' and other similarly situated inmates' statutory right to consideration for parole after serving one-third of their judicial sentences or the months to serve calculated under the Parole Decision Guidelines and to make continued incarceration mandatory that they serve at least ninety percent of their judicial sentences:

> "Even when the sentence is not at issue, a law may be retrospective not only if is alters the length of the sentence, but also if it changes the maximum sentence from discretionary to mandatory." *Id* at 32.

In *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 663 (1974) the Supreme Court observed that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the Ex Post Facto clause (citations omitted) of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the ...offense." Quoting *Rooney v. North Dakota*, 196 U.S. 319, 325 (1905). Judge O'Kelley in *Coleman Jackson v. State Board of Pardons and Paroles*, supra, after quoting the above from *Marreno*, pointed out, "That same Supreme Court cited with approval, a decision of the United States Court of Appeals for the Ninth circuit holding that "under California law, a convicted person's eligibility for parole consideration (as opposed to parole) is part of the 'law annexed to the crime when committed'... and any legislative change in such eligibility which would work to a prisoner's disadvantage may not be retroactively applied." Citing *Love v. Fitzharris*, 460 F2d 382, 383 (9th Cir. 1972), vacated on other grounds, 409 U.S. 110 (1973). (A-29-30).

Garner v. Jones, supra at 256, instructs that the practical implementation of discretion by a parole agency will

violate Ex Post Facto if its actions create a "significant risk of increased punishment." It is not only a significant risk, but an absolute certainty that the Petitioners will serve a very substantial increased punishment because of the retroactive application of the unpublished ninety percent to serve policy to extend Petitioners' sentences to serve beyond the published parole laws and Parole Decision Guidelines in effect at the time commission of their offences and beyond which the Petitioners would have had no public legal notice of the increased punishment.

The Petitioners have been unconstitutionally incarcerated beyond when they likely would have been released on parole on their calculated Temporary Parole Month which Judge O'Kelley found was a likely parole date under the enacted parole laws and the Parole Decision Guidelines in effect at the time of commission of their offenses. (A-40). Every day that Petitioners are extended beyond the time that they likely would have been released beyond their sentences to serve under existing parole laws and the Parole Decision Guidelines is a continuing constitutional violation. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

The legally controlling parole laws contained in O.C.G.A. §§ 42-9-45 and 42-9-40 are the existing laws dictating that inmates are to be eligible for release on parole after serving one-third of their judicial sentences or the months to serve calculated under the Parole Decision Guidelines. When the Defendants as members of Board in each inmate's case applies the unpublished ninety percent policy to override the existing parole laws affecting the length of an inmate's sentence to serve effectively foreclosing consideration for parole, they are practically changing the existing parole laws retroactively to the Petitioners offenses without previous legal notice after the commission of the offense to effect an increase the inmate's punishment beyond the enacted parole laws and published regulations in effect at the time of commission of the offense.

The teachings of *Garner* and *Morales* are that the "practical implementation" (514 U.S. at 509) has the "effect" (529 U.S. at 255) of retroactively increasing their punishment. This "sufficient risk" of increasing an inmate's punishment arises to a certainty under the Respondents' de facto ninety percent to serve policy that the Petitioners will have to serve almost triple their sentences to serve than under the enacted parole laws and the Parole Decision Guidelines.

The parole laws in legal effect at the time of commission of the alleged offenses of each Petitioner were and still do provide for consideration for parole after serving one-third of their judicial sentences or the months to serve calculated under the Parole Decision Guidelines. The practical implementation of the unpublished ninety percent to serve policy has the effect of substantially increasing the Petitioners' and over ten thousand other similarly situated inmates' punishment after they committed their offenses and after their judicial sentences by retroactively applying this unpublished policy of which there is no prior fair legal notice in violation of Ex Post Facto protections of the United States Constitution.

It is one thing for the Board to exercise discretion in granting or denying an individual parole based on incompatibility with their own welfare or the welfare of society under the express grant of O.C.G.A. §. 42-9-45(c) of which there is no contention as to the Petitioners. It is another to completely foreclose the Petitioners from even the consideration for parole as an entire classes of inmates contrary to the controlling parole laws and published guidelines under the guise of discretion as an excuse for violation Ex Post Facto protections of the United States Constitution. The Eleventh Circuit in *Knuck v. Wainwright*, 759 F. 2d 856 (11th Cir. 1985) had previously held the extending of inmates sentences to serve in violation of Ex Post Facto when the gain time for good behavior was

eliminated. The Third Circuit in *Mickens-Thomas v. Vaughn*, 321 F. 3d 374 (3d Cir. 2003) recently held that a change in discretionary parole policies governing early release by the Pennsylvania Parole Board violated Ex Post Facto, reaffirming that "The presence of discretion does not displace the protections of the Ex Post Facto clause." Citing *Garner*, 529 U.S. at 353. 321 F. 3d 374, 386. The Third Circuit in *Mickens-Thomas* squarely ruled on the same issue in the instant case that a parole agency must rely on the parole laws in place at the time of commission of the offense.

Garner v. Jones, supra, and *California Department of Corrections v. Morales*, supra, hold the practical result of implementation of actions by a parole agency which creates a significant risk of prolonging an inmate's incarceration violates Ex Post Facto. As Judge O'Kelley found quoting from these precedent cases that "'through evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than (he would have received) under the earlier rule.' *Garner* 529 U.S. 252,at 255. To make such a showing the inmate need not prove 'that he definitely would have served a lesser sentence under the previous legal regime,' *Jones v. Georgia State Board of Pardons and Paroles*, 59 F3d 1145, 1149(11th Cir. 1995) (citing *Miller v. Florida*, 482 U.S. 423, 432 (1987), only that the challenged procedure creates a 'sufficient risk' of doing so. *Morales*, 514 U.S. 499, 509." (A-29-30).

It is a mathematical certainty that this unpublished policy change increases the likelihood and the sufficient risk that the Petitioners' and all other similar situated inmates' extended sentences to serve will be increased at least from the statutory one-third threshold or the months to serve calculated under the parole decision guidelines to a de facto minimum of ninety percent of judicial sentences to serve. After review of the statistical evidence Judge O'Kelley analyzed that "the Board deviated below the 90% threshold in exactly 10 cases

out of 8,664. (A). "Because each of those cases involved highly unusual circumstances, however, the number of downward deviations really amounts to zero" and the previous District Court decision found that "the 90% time-served policy serves as an inflexible benchmark below which the Board almost never deviates." (A-36). Judge O'Kelley also found that previous to the implementation of the ninety percent to serve policy that the Petitioner Coleman Jackson would likely have been paroled in accordance with the Tentative Parole Month calculated under the Parole Decision Guidelines. (A-40).

The unpublished ninety percent to serve policy was adopted in part for the ostensibly political reason recited in the Resolution to "make Georgia the toughest state in the nation for 'time served' for violent felonies and residential burglaries." However, the overriding economic motivation for the Respondents' adoption of the ninety percent to serve policy was the fact that the State of Georgia had applied for to become the recipient of very substantial federal grant funds to build new prisons under the Violent Offenders Incarceration - Truth in Sentencing Act ("VOITIS"), 42 U.S.C. § 13704, *et seq.* This Act required that the average time to serve of judicial sentences must be at least 85% for a substantially similar list of violent offenses to the Boards' ninety percent to serve policy in order to qualify for the grant funds to build prisons. Specifically, the grant guidelines pursuant to 42 U.S.C. § 13704 (a) (1) require that to be eligible to receive the grant funds to build prisons that within three years:

> "(A) (i) such State has implemented truth in sentencing laws that require persons convicted of a part I violent crime to serve not less than 85 percent of the sentence imposed...(C)(ii) persons convicted of a part I violent crime on average serve not less than 85% of the maximum prison term allowed under the sentence imposed by the court."

In order to qualify for VOITIS grant funds two legislative Bills had been introduced for passage in the Georgia legislature: one which was enacted as O.C.G.A. § 10-10-6.1 requiring that offenders convicted of the seven most serious violent offense categories serve one hundred percent of their sentences, and another, S.B. 100 (1997), which was defeated required that other violent felons serve the extended time of their sentences. After the legislative attempt failed to enact the extended time to serve law for the other violent offense categories, Georgia turned to the Respondent members of the Board to adopt the ninety percent to serve policy having the practical force of law since they exercise exclusive control of parole eligibility. Georgia specifically spotlighted and cited to the Board's ninety percent to serve policy in its VOITIS application for federal grant funds. The Georgia "1998 Application for Violent Offenders Incarceration and Truth in Sentencing Incentive Grant" evidences that the ninety percent to serve policy was adopted to qualify for VOITIS grant funds. This Georgia application explains in bold type the Board's extended time to serve "policy" changes that were in effect tantamount to law in order for Georgia to be eligible for grant funds that: "The new policy makes it mandatory that these violent offenders serve 90% of their court imposed sentence prior to consideration of parole." A 1998 Supplemental Application even attaches a State Board of Pardons and Paroles' news release and explanation of the Board's "Amended Policy for the Parole of Violent Offenders" in order to quality for tier two VOITIS grant funds. Georgia was then successful and did receive funds through FY 2000 for a total of $82,236,509 received from the federal government under VOITIS.

Regardless of motive, the operative facts are that Petitioners' sentences to serve have been extended beyond the parole laws and the Parole Decision Guidelines by the ninety percent to serve policy of which Petitioners would not have public knowledge of this secret law, and Petitioners' sentences to serve have been almost tripled by the subsequent

imposition of the unpublished Board policy retroactively applied, after they committed their offenses, in gross violation of Ex Post Facto as well as Due Process.

Thus the Faustian deal, motivated to receive VOITIS grant funds, traded the freedom of the Petitioners and many, many other inmates substantially extending their sentences to serve de facto ninety percent in return for the receipt by Georgia substantial federal grant funds to build new prisons. It is constitutionally shocking that in order to receive VOITIS federal grant funds, Georgia without any legal underpinnings by unpublished policy fiat increased the parole threshold for Petitioners' sentences to serve from one-third to de facto ninety percent of judicial sentences by the Respondents administratively adopting an unpublished policy having the practical force and effect of law that substantially and retroactively extended Petitioners' and similarly situated inmates' sentences to serve.

II. INCREASING SENTENCES TO SERVE OF PETITIONERS WITHOUT FAIR LEGAL WARNING ALSO VIOLATES DUE PROCESS

The unpublished ninety percent to serve Resolution has the practical effect of a secret law of which the public has no legal notice that is slavishly enforced by the staff of the Board without any practical consideration by the Respondent Board members in extending inmates sentences ninety percent to serve before consideration for parole. (A-37). The offenses of the Petitioners were committed after the unpublished "effective date" of the ninety percent to serve policy, but the Ex Post Facto effect on the Petitioners' sentences is the same to extend their time to serve without prior fair legal notice by this secret policy which is applied retroactively to extend sentences to serve after commission of their offenses. The application of the unpublished ninety percent to serve policy violates Due Process as well as Ex Post Facto protections by increasing

Petitioners' and other similarly situated inmates' sentences substantially beyond the controlling parole laws and guidelines in existence at the time of commission of their offenses and which are still the existing laws and guidelines.

The District Court found that because the Board had posted a news release on its web site that the Petitioners' contention that "the 90% percent policy was 'secret' and 'unpublished' is without merit." (A-16). The Eleventh Circuit took a similar view that the news release gave fair notice of the policy change. (A-8). However, both the District Court and the Eleventh Circuit ignored the Georgia Administrative Procedure Act requirements and the Georgia parole law requirements that any policy, rule, or regulation to be valid must be filed with the Secretary of State and published under strict legal requirement before it can have any legal effect. The announcing of the internally resolved ninety percent to serve policy in a news release hardly comports to any legally authorized or civilized system of legal notice of a substantive change having the practical effect of law to almost triple sentences to serve to increase the punishment of the Petitioners and other similarly situated inmates who were entitled to legally rely on the enacted parole laws and the Parole Decision Guidelines to determine the length of sentences to serve.

The unpublished ninety percent to serve policy internally "resolved" by the Board members cannot qualify as a prospective rule or regulation. But most assuredly, the "policy" slavishly and practically operates as a de facto law. The ninety percent to serve policy cannot be a valid rule or regulation since it was not enacted in accordance with the Georgia Administrative Procedure Act or filed to be published with the Georgia Secretary of State giving prospective legal notice to the public. Nor could the "policy" be a change in the Parole Decision Guidelines which also requires compliance with the Georgia Administrative Procedure Act in accordance with the requirements of O.C.G.A. § 42-9-40(b) or valid under

O.C.G.A. § 42-9-45 (d). Neither could the policy be a valid Board rule or regulation under O.C.G.A. § 42-9-46 (a) which prohibits rules and regulations, "not inconsistent with this chapter."

The Eleventh Circuit decision misconstrues the Petitioners' purpose in arguing that the Board's ninety percent to serve policy did not comply with Georgia Administrative Procedures Act. O.C.G.A. § 50-13-1, *et seq.* which was to demonstrate that the unpublished policy could not have any legal force or effect of law as "any rule, regulation, resolution, etc. by whatever named called" and "shall not be valid or effective against any person or party nor may it be invoked by the agency." *Opinion of Attorney General No. 71-158.* Implementing the unpublished ninety percent to serve policy to override the enacted parole laws entitling Petitioners to consideration for parole after serving one-third of their sentences or the months to serve calculated under the Parole Decision Guidelines violates the Due Process because the unpublished policy cannot constitutionally comply with the mandate of Due Process as well as Ex Post Facto that "legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, supra at 28.

Yet the unpublished de facto ninety percent to serve policy is slavishly enforced as a de facto law and its effect on the Petitioners and similar situated inmates is to practically completely foreclose any opportunity for parole until they have served a de facto ninety percent of their judicial sentences. It gives no legal notice to the public, and is not a policy, rule or regulation pursuant to which the Board may validly enforce their de facto ninety percent to serve policy to extend the duration of inmates' sentences to serve in violation of the Ex Post Facto and Due Process protections of the United States Constitution. Judge O'Kelley found in *Coleman Jackson* that the enforcement of the ninety percent policy's "application has the

force and effect of law." (A-35). It is obvious that the Respondents' actions as members of the Board under color of law in applying the de facto ninety percent to serve policy has significantly increased the duration of the sentences to serve of the Petitioners and similarly situated inmates beyond the statutory parole thresholds which was and still is being retroactively applied to substantially extend their incarcerated punishment in violation of fundamental protections of fair legal warning.

Under the protective cloak of Due Process a criminal defendant is entitled to fair notice of enhanced punishment. *Garner v. Florida*, 430 U.S. 349 (1976). A defendant when judicially sentenced is entitled to have applied the paroles laws legally in effect at the time of the commission of the offense. Secret law as always been an anathema to civilized society, but that is exactly what is being enforced by the Respondents practically having the force of law and extending the duration of Petitioners'' and other similarly situated inmates' sentences to serve. When the Board subsequently applies their unpublished policy to subsequently extend a defendant's sentence to serve, it is a retroactive application of their unpublished and slavishly enforced policy to increase a defendant's punishment in violation of the Due Process as well as Ex Post Facto protections of the United State Constitution.

The Eleventh Circuit decision cited *Sultenfuss v. Snow*, 35 F. 3d 1494 (11th Cir. 1994) as foreclosing Georgia inmates from making liberty interest due process claims. (A -9). However, *Sultenfuss* which was decided on the now overruled search for mandatory state language test that in *Sandin v. Conner*, 515 U.S. 472, 483 (1995) was abandoned by the United States Supreme Court in favor of "real concerns under girding the liberty interest protected by the Due Process Clause." *Sultenfuss* which is a due process case would not apply to the substantial Ex Post Facto violations by the Georgia Board nor is *Sultenfuss* still the law in light of the United States Supreme Court's subsequent and now controlling decisions of

Garner v. Jones, supra, *California Department of Corrections v. Morales*, supra, and *Sandin v. Conner*, supra. The practical realities test of *Garner* and *Morales* to determine a sufficient risk of Ex Post Facto violation and the real concerns under girding the liberty interest protected by the Due Process clause announced in *Sandin* now determine protected liberty interests, not the presence or absence of state mandatory language. The United States Supreme Court has now held that the "Due Process clause of its own force" may create a protected liberty interest" (*Sandin* at 474) and that the practical realities of creating a sufficient risk of retroactively increasing an inmate's punishment violate Ex Post Facto (*Morales* at 509 and *Garner* at 255). Thus, the controlling United States Supreme Court law has changed from *Sultenfuss*' state mandatory language analysis to now look to the practical realities of the state action which the Georgia Board has retroactively created as a very substantial and certain retroactive increase in the Petitioners' and similarly situated inmates' sentences to serve. The real concerns of Due Process when viewed against the Ex Post Facto practical realities of what the Georgia Board has done to retroactively and substantially increase the sentences of inmates without fair legal warning should at least recognize their liberty interest not to have their Due Process and Ex Post Facto rights continue to be egregiously violated.

The harsh facts alleged in the Complaint as well as demonstrated with filed evidence and documents in the record are that the Petitioners and similarly situated inmates have been and still are being retroactively extended in their incarceration by the Respondents' following their de facto ninety percent to serve policy of substantially extending sentences to serve by almost triple the incarceration time to serve before being eligible for release on parole substantially beyond the time that they routinely would have been likely released on parole under the parole laws in effect at the time of commission of their offenses which are a one-third threshold for eligibility for parole under O.C.G.A. § 42-9-45 and the time to serve calculated under the Parole Decision Guidelines mandated

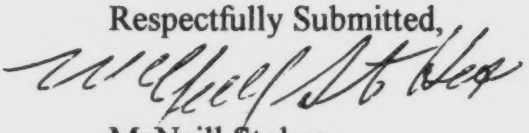
under O.C.G.A. § 42-9-40. The Petitioners' eligibility for parole has been and still is being administrative foreclosed and their sentences substantially extended to the de facto ninety percent to serve threshold without fair legal notice retroactively overriding the existing parole laws and guidelines to substantially extend the Petitioners' and other similarly situated inmates' sentences to serve in violation of the Ex Post Facto and Due Process protections of the United States Constitution.

CONCLUSION

The enormity of the of the constitutional injury is that every day, every month, and every year Petitioners as well as many, many thousands of other similarly situated inmates have had their sentences to serve greatly extended and they have been continued to be unconstitutionally incarcerated beyond the time that they should have been released on parole in accordance with the enacted parole laws and statutorily mandated guidelines but for the unconstitutional retroactive actions of the Respondents adopting and enforcing an overriding unpublished policy having the practical force and effect of law without fair legal warning of increased incarceration punishment. The Respondents have and are continuing to perpetrate one of the most massive civil rights abuses of recent times wherein more than ten thousand inmates have had their sentences to serve retroactively almost tripled and have been de facto foreclosed from parole under the existing parole laws.

If the Respondents can by unpublished policy practically change the legislatively enacted parole laws and guidelines to increase Petitioners' and similar inmates' incarcerated punishment substantially extending sentences to serve almost triple without fair legal warning and de facto foreclose Petitioners from parole beyond the time that Petitioners would likely have been released on parole in accordance with the published parole laws, then important checks and balances of the republic will have been lost.

Respectfully Submitted,



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No. _____

In The Supreme Court of the United States

MARGARET F. BRANCH; RANDALL MANGOLD; CONNIE R. BRACKET,

Petitioners,

v.

MILTON E. NIX, JR.; GARFIELD HAMMONS, JR.; BETTY ANN COOK; EUGENE P. WALKER; J. MICHAEL LIGHT; JOE FERRERO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16298-II

MARGARET F. BRANCH,
RANDALL MANGOLD,
CONNIE R. BARCKETT,

Plaintiffs-Appellants,

versus

MILTON E. NIX, Jr.,
GARFIELD HAMMONS, Jr.,
BETTY ANN COOK,
EUGENE P. WALKER,
J. MICHAEL LIGHT,
JOE FERRERO,

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 30 2004
THOMAS K. KAHN
CLERK

Defendants-Appellees,

- - - - - - - - - - - - - - - - - - -

Appeal from the United States District Court for the
Northern District of Georgia

- - - - - - - - - - - - - - - - - - -

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion_____, 11th Cir., 19__, _____F. 2d_____).

Before, EDMONDSON, Chief Judge, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/J.L. EDMONDSON

CHIEF JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16298
Non-Argument Calendar

D.C. Docket No. 03-00537-CV-CAP-1

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
July 22, 2004
THOMAS K. KAHN
CLERK

MARGARET F. BRANCH,
RANDALL MANGOLD,
CONNIE R. BARCKETT,

Plaintiffs-Appellants,

versus

MILTON E. NIX, Jr.
GARFIELD HAMMONS, Jr.,
BETTY ANN COOK,
EUGENE P. WALKER,
J. MICHAEL LIGHT,
JOE FERRERO,

Defendants-Appellees,

Appeal from the United States District Court
for the Northern District of Georgia

(July 22, 2004)

Before EDMONDSON, Chief Judge, BLACK and

BARKETT, Circuit Judges.

PER CURIAM:

Plaintiffs inmates in Georgia prisons, brought this section 1983 action, 42 U.S.C. § 1983, on behalf of themselves and other similarly situated inmates, contending that Defendants, the Georgia Board of Pardons and Paroles (the "Board") and named members, violated their constitutional rights against ex post facto laws. The district court granted Defendants' motion for summary judgment and denied Plaintiffs' motion for equitable relief. Plaintiffs' appeal. No reversible error has been shown; we affirm.

On 9 December 1997, the Board passed a resolution pursuant to which they announced that the Board's policy would be to require, effective 1 January 1998, certain listed violent offenders and residential burglars to serve a minimum of 90 percent of their court-imposed sentences.[1] This new policy was posted on the Board's website on 2 January 1998. Under this new policy, persons convicted of

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[1] The Board's 9 December 1997 resolution applied to all inmates who were convicted on or after 1 January 1998. In Jackson v. State Board of Pardons and Paroles, No. 2:01-CV-068-WCO; 2002 WL 1609804 (N.D. Ga. 2002), the district court determined that the retroactive application of the Board's 90 percent-to-serve policy to inmates whose offense conduct pre-dated adoption of the policy violated the ex post facto clause. The Board amended the policy on 9 September 2002 to provide that it would apply only to those offenders who committed their crimes on or after 1 January 1998. We assume for purposes of this appeal -- and the Board does not argue otherwise -- that, as the Jackson court concluded, application of the Board's 90 percent-to-serve policy to inmates whose crimes were committed before the policy was adopted would implicate the ex post facto clause.

the listed offenses would be assigned a tentative parole month ("TPM") at a point that assured that 90 percent of the sentence had been served before parole would be granted. Absent this policy change, inmates who had committed the offenses underlying Plaintiffs' convictions were assigned a TPM based on the inmate serving the greater of one-third of their judicial sentences, O.C.G.A. § 42-9-45(b), or the months-to-serve calculated under the Parole Decision Guidelines mandated by O.C.G.A. § 42-9-40(a).[2]

According to Plaintiffs, application of the 90 percent-to-serve policy increased Plaintiff Mangold's time-to-serve from 40 months to 108 months; increased Plaintiff Branch's time-to-serve from 52 months to 108 months; and increased Plaintiff Brackett's time-to-serve from 34 months to 54 months.

Plaintiffs advance an ex post facto challenge to the increase in their time-to-serve under the Board's 90 percent policy. But the *sine qua non* of an ex post facto law is retrospective effect or application. Plaintiffs each committed their offenses of conviction after the Board adopted the 90 percent-to-serve policy; no retrospective effect can be shown. Simply stated, because the Board's policy pre-dated the commission of Plaintiffs' offenses, the policy was in effect when the offenses were committed. As a matter of law, the Board infringed no ex post facto prohibition when it applied its pre-existing policy to the determination of the TPM for each of these Plaintiffs.

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[2] In announcing the policy change, the Board stated that it already often required persons convicted of the listed offenses to serve 90 percent or more of the imposed sentence. By articulating the 90 percent policy, the Board intended to simplify and to clarify its time-served practices so that the state's judges and district attorneys could better gauge appropriate sentencing.

Plaintiffs argue that the Board failed to publish properly the 90 percent-to-serve policy. Plaintiffs contend that the Board was required, pursuant to the statutorily mandated parole guidelines system (see O.C.G.A. 42-9-40(b); 42-9-45(d)) to publish and to file the 90 percent-to-serve policy in accordance with the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-1, et seq.; instead, the Board issued a press release that was posted on the Board's website. See http://www.pap.state.ga.us/News.htm, (news release dated 01/02/98). The Board counters that the 90 percent-to-serve policy indicates how the Board will exercise its discretion; the Administrative Procedure Act has no application because the Board did not promulgate the policy as a rule or regulation as contemplated by O.C.G.A. § 42-9-45(d).

We need not decide whether the Board promulgated properly under state law the 90 percent-to-serve policy. Plaintiffs bring this action under section 1983; and Plaintiffs must show, among other things, that they have suffered a violation of a right secured by the Constitution of the United States. The Board's policy change pre-dated the acts for which Plaintiffs are incarcerated. The Board announced the policy change on the Board's website before the Plaintiffs committed the offenses. Plaintiffs' protestations to the contrary notwithstanding, the policy change was no "secret" law; the published press release gave fair notice of the policy change. Unless a state law requirement is also a federal constitutional requirement, whether procedures employed complied with state law fails to control our inquiry in a section 1983 action.

Plaintiffs also assert a due process challenge to the Board's 90 percent-to-serve policy based on a claimed liberty interest in parole. The district court concluded correctly that Plaintiffs have no liberty interest or constitutionally-protected expectation concerning parole

under the Georgia parole system. See Sultenfuss v. Snow, 35 F.3d 1494, 1502 (11th Cir. 1994) ("[v]iewing Georgia's parole system in its entirety, we conclude that no protected liberty interest in parole is created"); Jones v. Ray, 279 F.3d 944, 946 (11th Cir. 2001) (Georgia inmates are foreclosed by Sultenfuss from making a liberty interest due process claim based on state law and no federal constitutional right to parole exists independent of a state created liberty interest).

AFFIRMED.

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta

DEC 2 2003
LUTHER D. THOMAS, Clerk
By:
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARGARET BRANCH, et al.,	:	PRISONER
	:	CIVIL RIGHTS
Plaintiffs,	:	42 U.S.C. § 1983
	:	
v.	:	
	:	CIVIL ACTION NO.
MILTON E. NIX, JR., et al.,	:	1:-03-CV-0537-CAP
Defendants.	:	

ORDER

This case is before the Court on Plaintiffs' motion for equitable relief [Doc. 6], Defendants' response to the motion for equitable relief [Doc. 8], Plaintiff's reply thereto [Doc. 10], Defendants' motion for summary judgment [Doc. 7], Plaintiffs' response to the summary judgment motion [Doc. 9], Defendants' reply thereto [Doc. 13], and Defendants' response to Plaintiffs' statement of undisputed facts [Doc. 14]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that Defendants' motion for summary judgment [Doc. 7] should be **GRANTED** and Plaintiffs' motion for equitable relief [Doc. 8] should be **DENIED**.

I. Background

Plaintiffs Margaret F. Branch, Randall Mangold, and Connie R. Brackett bring this action against Georgia Board of Pardons and Paroles ("Board") members Milton E. Nix, Jr., Garfield Hammonds, Jr., Dr. Betty Ann Cook, Dr. Eugene P. Walker, J. Michael Light, and Acting Commissioner of the Georgia Department of Corrections ("GDC") Joe Ferrero. Plaintiffs contends that Defendants violated their constitutional rights in connection with their parole consideration by the Board. Specifically, Plaintiffs argue that their ex post facto rights have been violated by the retroactive application of a policy by the Board.

The undisputed facts of this case are as follows: On September 18, 2000, Plaintiff Margaret F. Branch was convicted of voluntary manslaughter and burglary in the DeKalb County Superior Court and was sentenced to ten years for each crime, to run concurrently. Branch committed the crimes in 1999. (Affidavit of Melissa Rodgers "Rodgers Aff.", ¶ 5). Branch was considered for parole and was notified of the Board's decision in a letter dated October 9, 2001. Id. at ¶ 6). The Board voted to adopt the recommended tentative parole month of June 2008, after Branch has served 90% of her sentence. (Id.).

On September 15, 2000, Plaintiff Randall Mangold was convicted of involuntary manslaughter in the Camden Superior Court and was sentenced to ten years. (Rodgers Aff., ¶ 7). Mangold committed the crime in 1999. (Id.). Mangold was considered for parole and was notified of the Board's decision in a letter dated May 16, 2001. (Id. at ¶ 8). Mangold became statutorily eligible for parole after serving 40 months. (Id.). However, the Board voted to adopt the recommended tentative parole month of January 2009, after Mangold has served 90% of his sentence. (Id.). Mangold was later notified that his tentative parole month had been

changed to November 2008, which reflects credit for time served prior to sentencing. (Id. at ¶ 9).

On June 29, 2000, Plaintiff Connie R. Brackett was convicted in the Paulding County Superior Court of 12 counts of burglary and two counts of theft by taking and was sentenced to twenty years with five to serve on each of the 12 counts of burglary, to be served concurrently, and ten years with five to serve on each of the counts of theft by taking, to be served concurrently. (Rodgers Aff., ¶ 10). Brackett's crimes were committed in May of 1998. (Id.). Brackett was considered for parole and was notified of the Board's decision in a letter dated February 12, 2001. (Id. at ¶ 11). The Board voted to adopt the recommended tentative parole month of September 2004, after Brackett has served 90% of her sentence. (Id.).

On December 9, 1997, the Board adopted a policy amending the Board's Parole Decision Guidelines System to provide that any offender convicted on or after January 1, 1998, of residential burglary or nineteen (19) other specified crimes, the Guidelines' recommended time to serve would be at least 90% of the court imposed prison sentence, regardless of the grid component "score" of the offender.[1] (Rodgers Aff., ¶ 12; Def. Ex. 5). On September 9, 2002, the Board amended its 90% policy for offenders convicted of residential burglary and the other specified crimes to provide

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[1] This Court takes judicial notice of the fact that, on its web site, the Board announced the new 90% policy in January 1998. See Georgia State Board of Pardons and Paroles, News Releases, http://www.pap.state.ga.us/NRFrames.htm (Jan. 2, 1998, release, Policy Mandates 90% Prison Time for Certain Offenses) ("Since 1991 the Board has steadily and consistently amended and refined its guidelines and policies to provide for lengthier prison service for violent criminals.").

that the policy shall only be applied to those offenders who committed their crimes on or after January 1, 1998. (Rodgers Aff. ¶ 13; Def. Ex. 6).

On February 27, 2003, Plaintiffs filed the instant complaint [Doc. 1] seeking equitable and monetary relief for alleged constitutional violations involving their parole reconsideration.[2] On June 16, 2003, Plaintiffs filed a motion for equitable relief [Doc. 6], seeking to enjoin the Board from retroactively enforcing the "unpublished" 90% policy. On July 2, 2003, Defendants filed a motion for summary judgment [Doc. 7], claiming that Plaintiffs' ex post facto claims are without merit because the 90% policy was not applied retroactively to Plaintiffs and that, in the alternative, Defendants are immune from suit.

II. Summary Judgment Standard

Summary judgment is not properly viewed as a device that the trial court may, in its discretion, implement in lieu of a trial on the merits. Instead, Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of every element essential to that party's case on which that party will bear the

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[2] Plaintiffs also filed this action as a habeas corpus petition brought pursuant to 28 U.S.C. § 2254. However, the case is more properly brought as a civil rights action pursuant to 42 U.S.C. § 1983, because a declaration by the Court that the 90% policy should not be applied to Plaintiffs would not automatically lead to their release. Thomas v. Georgia State Board of Pardons and Paroles, 881 F.2d 1032, 1033 (11th Cir. 1989). See also, Jackson v. Georgia Board of Pardons and Paroles, No. 2:01-CV-068-WCO; 2002 WL 1609804 (N.D. Ga. May 30, 2002) (treating similar challenge as a § 1983 action).

burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such a situation, there can be no genuine issue as to any material fact, as a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Id. at 322-23.

The movant bears the initial responsibility of asserting the basis for his motion. Id. at 323; Apcoa, Inc. v. Fidelity Nat'l Bank, 906 F.2d 610, 611 (11th Cir. 1990). The movant is not required to negate his opponent's claim, however. The movant may discharge his burden by merely "'showing' -- that is, pointing out to the district court-- that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. After the movant has carried his burden, the nonmoving party is then required to "go beyond the pleadings" and present competent evidence[3] designating "'specific facts showing that there is a genuine issue for trial.'" Id. at 324 (quoting Fed. R. Civ. P. 56(e)). While the court is to view all evidence and factual inferences in a light most favorable to the nonmoving party, Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988), "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

A fact is material when it is identified as such by the controlling substantive law. Id. at 248. An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. Id. at 248. The nonmovant "must do more than simply show that there is some

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[3] The nonmoving party may meet its burden through affidavit and deposition testimony, answers to interrogatories, and the like. Celotex, 477 U.S. at 324.

metaphysical doubt as to the materials facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Electric Indus. Co. V. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." Anderson, 477 U.S. at 249-50. Thus, to survive a motion for summary judgment, the nonmoving party must come forward with specific evidence of every element material to that party's case so as to create a genuine issue for trial.

III. Discussion

Plaintiffs argue that the application of the 90% policy to Plaintiffs' parole consideration violates their constitutional protection against ex post facto laws. Section 1983 provides, in relevant part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress
>
> . . .

Thus, in order to establish a claim under Section 1983, Plaintiffs must show a violation of a right secured by the Constitution of the United States and also show that the deprivation was committed by a person acting under color of state law. Cummings v. DeKalb County, 24 F.3d 1349 (11th Cir. 1994); see also Graham v. Connor, 490 U.S. 386, 393-

94 (1989) ("§ 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred") (internal quotes omitted) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3, (1979)).

Plaintiffs' ex post facto claims fail as a matter of law. The Constitution prohibits states from enacting ex post facto laws. U.S. Const., Art. I, § 10, cl. 1. "One function of the Ex Post Facto Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission." Garner v. Jones, 529 U.S. 244, 249 (2000).

It is undisputed that Plaintiffs committed their offenses for which they were convicted in 1999 (Branch and Mangold) and May of 1998 (Brackett).[4] The Board's 90% policy became effective on December 9, 1997, prior to the commission of Plaintiffs' offenses. See Jackson, 2002 WL 1609804. Thus, the 90% policy could not have been retroactively applied to them. That policy also could not have increased their punishment after they committed their crimes because the policy already was in effect at the time that Plaintiffs committed their offenses. Accordingly, as a matter of law, the Board did not violate the Ex Post Facto Clause when determining Plaintiffs parole consideration date.

Plaintiffs' argument that the 90% policy was "secret" and "unpublished" is without merit. As previously noted, this Court takes judicial notice of the fact that the Board announced the policy on its website in January of 1998. See Georgia State Board of Pardons and Paroles, News Releases, http://www.pap.state.ga.us/NRFrames.htm (Jan. 2, 1998, release, Policy Mandates 90% Prison Time for Certain

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[4] An ex post facto violation is determined by the date of the commission of the offense, rather than the date of conviction. Weaver v. Graham, 450 U.S. 24, 30-31 (1981).

Offenses) ("Since 1991 the Board has steadily and consistently amended and refined its guidelines and policies to provide for lengthier prison service for violent criminals.").

The Court notes that Plaintiffs have no liberty interest or constitutionally-protected expectation of being paroled in the Georgia Parole system. Sultenfuss v. Snow 35 F.3d 1494, 1499-1501 (11th Cir. 1994), cert. denied, 513 U.S. 1191 (1995). The Board has broad and unfettered discretion in reaching parole decisions as to each inmate based upon their individual history and circumstances. Id. at 1499-1501. The Board is not required to reach any particular result in a given case, to adhere to any uniform standard of review, or to abide by the parole guidelines in administering parole. Id.

In short, Plaintiffs cannot defeat Defendants' motion for summary judgment because they have failed to produce evidence that, if proven at trial, would allow a fact-finder to find that Plaintiffs have suffered an ex post facto violation.[5]

IV. Conclusion

V.

For the foregoing reasons, the Court finds that Defendants' motion for summary judgment [Doc. 7] is **GRANTED**, and Plaintiffs' motion for equitable relief [Doc. 6] is **DENIED** as moot.

IT IS SO ORDERED, this 2 day of December, 2003.

s/Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
UNITED STATES DISTRICT JUDGE

[5] Consequently, it is unnecessary for this Court to consider whether Defendants are immune from suit.

FILED IN CLERK'S OFFICE
U.S.D.C. – Gainesville
MAY 30, 2002
LUTHER D. THOMAS, Clerk
By: /s/ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

COLEMAN JACKSON,	:	
	:	
Plaintiff,	:	
vs.	:	CIVIL NO.
	:	2:01-CV-068-WCO.
STATE BOARD OF PARDONS & PAROLES; DEPARTMENT OF OFFENDER REHABILITATION OF THE STATE OF GEORGIA,	:	
	:	
Defendant.	:	

ORDER

The captioned case is before the court for consideration of plaintiff's motion for equitable judgment [7-1].

I. Background

Plaintiff is currently confined at the Hall County Correctional Institute pursuant to an August 4, 1999 conviction for aggravated assault in the Superior Court of Fulton County, Georgia. See State v. Jackson, No. Z85142 (Ga.Super. Ct. filed Dec. 20, 1996). Based upon a grand jury indictment charging him with "unlawfully commit[ting] an

assault upon the person of Shirley Ann Welch, by shooting at, toward, and in her direction with a pistol, and by striking and beating her with a pistol," the court sentenced plaintiff to confinement for a period of twenty years, with five years to serve (Pl.'s Ex. 5 at 33; Def.'s Ex. 4 at 2).[1] Plaintiff did not appeal his conviction or sentence.

As of August 25, 1996, the date of plaintiff's offense, the Georgia General Assembly required prisoners convicted of aggravated assault to serve a minimum of "one-third of the prison term imposed by the sentencing court" before becoming eligible for an initial parole hearing before the State Board of Pardons & Paroles ("the Board"). O.C.G.A. § 42-9-45(f) (2002). Nevertheless, on December 9, 1997, the Board adopted a resolution amending its statutory guidelines "to provide that any offender who is convicted on or after January 1, 1998, of one or more of [twenty enumerated offenses, including aggravated assault] ... will be required to serve a minimum of 90% of the court imposed term of incarceration in prison" (Pl.'s Ex. 1 at 1; Def.'s Ex. 2 at 2 ("90% time-served policy")). The Board's new 90% time-served policy thus increased the minimum number of months-to-serve for certain offenses, including plaintiff's, postponing the date of the earliest possible parole eligibility hearing until service of 90%, rather than one-third, of the inmate's prison sentence. Further, the Board applied its new policy retroactively; the policy applied to all covered convictions entered on or after January 1, 1998 even though, in many cases, the underlying criminal conduct had taken place prior to that date.

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[1] Unless otherwise indicated, "Ex." refers to exhibits admitted at the evidentiary hearing held in connection with this matter on April 10, 2002.

On October 2, 2000, the Board informed plaintiff that his recommended tentative parole month ("TPM"), the date upon which he would tentatively be entitled to his first parole eligibility hearing, had been scheduled for June of 2003 (Pl.'s Ex. 5 at 18; Def.'s Ex. 5). Plaintiff challenged his TPM by letter of October 24, 2000, requesting that the Board re-evaluate his parole eligibility (Pl.'s Ex. 5 at 16; Def.'s Ex. 3 at 16). In response, the Board informed plaintiff that, pursuant to its newly adopted 90% time-served policy, plaintiff "must serve 90% or 54 months of his sentence before any parole," and that "the Parole Board [would] not reconsider its decision...." (Pl.'s Ex. 5 at 13; Def.'s Ex. 3 at 13).

Consequently, plaintiff renewed his request for reconsideration by the Board, while also challenging his TPM before Georgia's Superior Courts Sentence Review Panel (Pl.'s Ex. 5 at 10, 12; Def.'s Ex. 3 at 10, 12). In both instances, plaintiff argued that the Board's decision to apply its 90% time-served policy to his offense retroactively increased the punishment inflicted upon him by the State of Georgia, in violation of the Ex Post Facto Clause of the United States Constitution. See U.S. Const. Art. I, § 10, cl. 1. Plaintiff's requests were subsequently denied on February 23, 2001 and March 27, 2001, respectively (Pl.'s Mot. for Equitable J., Ex. 4; Pl.'s Ex. 5 at 8; Def.'s Ex. 3 at 8). In its March 27, 2001 letter to plaintiff, the Board observed that "[m]any inmates whose offenses were committed prior to January 1, 1998, but were convicted after January 1, 1998, as was [plaintiff], have been considered under the Board's 90% policy ... The Board is unwilling to deviate from the manner in which this policy has been adopted and implemented" (Pl.'s Ex. 5 at 8; Def.'s Ex. 3 at 8).

Thereafter, on April 25, 2001, plaintiff filed a joint motion for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and a complaint for damages pursuant to 28 U.S.C. §

1983[1-1], re-asserting his Ex Post Facto Clause challenge in this court. United States Magistrate Judge John R. Strother, Jr. subsequently issued a report and recommendation ("R & R") [6-1] recommending that plaintiff's § 2241 petition be dismissed without prejudice for failure to exhaust his available state remedies, see 28 U.S.C. § 2254(b)(1) (2001); that Georgia's Eleventh Amendment immunity warranted the dismissal of plaintiff's § 1983 claims for money damages, see U.S. Const. amend. XI; Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989); and that plaintiff's § 1983 Ex Post Facto claim otherwise be permitted to proceed.

Over plaintiff's objections [7-1], the court adopted Judge Strother's R & R as the order of this court on March 7, 2002[8-1]. Yet, the court was unable to resolve plaintiff's motion for equitable judgment respecting plaintiff's surviving § 1983 claim [7-1], a motion that plaintiff had haphazardly incorporated into his objections to the magistrate's R & R. Specifically, the court noted that plaintiff's motion for equitable judgment, in which he sought to enjoin the Board's enforcement of the 90% time-served policy against him, was not in proper form. Plaintiff had failed to attach any affidavits in support of his factual contentions, in violation of Local Rule 7.1, see L.R. 7.1, NDGa., and plaintiff's factual allegations were insufficiently developed to properly adjudicate the motion. Nevertheless, the court determined that on its face, "[the Board]'s retroactive application of its 90% time-served policy to [plaintiff] [was] constitutionally suspect" (Order at 10). Accordingly, the court set the matter for an evidentiary hearing on April 10, 2002[9-1], at which time the Board was ordered to show cause, if any, why plaintiff's motion for equitable judgment should not be granted.

II. The April 10, 2002 Hearing

At the April 10, 2002 hearing, the Board offered

testimony from Ms. Tracy D. Masters ("Masters"), Director of the Board's Legal Services Division; Mr. Michael P. Sullivan ("Sullivan"), Director of the Board's Clemency Administration & Parole Selection Division; and Mr. Steve Baustin ("Baustin"), an Officer in the Board's Hearing Examiner Unit for Parole Decision Guidelines.

Baustin is one of ten hearing examiners responsible for the calculation of parole eligibility data and a TPM date for each inmate, which is then submitted to the Board for review. The Board thereafter votes to accept or reject the hearing examiner's recommendation. Although Baustin did not personally conduct the initial "months-to-serve" calculation respecting plaintiff's parole eligibility, he briefly outlined the standard procedure each examiner employs:

A. The Initial TPM Recommendation

First, the examiner identifies the inmate's "Crime Severity Level" on a table of offenses listed from least severe ("Level I") to most severe ("Level VII") (Pl.'s Ex. 4 at 2 ("Crime Severity Levels")). The table classifies aggravated assault as a "Level V" offense. Next, the hearing examiner calculates the inmate's "Total Parole Success Likelihood Score" on a "Parole Decision Guidelines" chart (Pl.'s Ex. 5 at 18; Def.'s Ex. 5; Def.'s Ex. 6). This score represents the sum of eight numerical "Parole Success Factors," historically-based data such as the inmate's number of prior convictions, previous parole or probation violations, and history of drug use. Based upon plaintiff's criminal and social history, plaintiff received a Total Parole Success Likelihood Score of 14.

Once the hearing examiner calculates the Crime Severity Level and Total Parole Success Likelihood Score, the examiner uses the two figures to identify the recommended number of "months-to-serve" on a Parole

Decision Guidelines Grid (Pl.'s Ex. 4 ("Guidelines Grid")). For a "Level V" offense with a Parole Success Likelihood Score of 14, the Guidelines Grid recommends that the inmate serve 34 months before being eligible for parole. Notably, the Guidelines Grid describes Parole Success Likelihood Scores in the 14-20 point range as "EXCELLENT."

The hearing examiner then calculates the inmate's TPM based upon the recommended months-to-serve from the Guidelines Grid. In plaintiff's case, for example, the 34 months-to-serve calculation would have generated a recommended TPM of October 2001. Yet, hearing officers cannot submit a TPM to the Board without also considering the minimum parole eligibility requirements: (1) the one-third time-served requirement under O.C.G.A. § 42-9-45(f); and (2) the 90% time-served policy. Further, according to Sullivan, the Director of the Board's Clemency Administration & Parole Selection Division, hearing examiners are instructed to recommend the lengthiest number of months-to-serve to the Board. Thus, as Baustin testified, the TPM date that the hearing examiner recommends to the Board will represent the greater of either (1) the inmate's Guidelines Grid score; or (2) 90% of the inmate's court-imposed prison sentence, if applicable to his offense.

Given his lack of involvement in plaintiff's initial TPM calculation, Baustin could only speculate as to why the Board assigned plaintiff a TPM of June 2003 instead of October 2001, the Guidelines Grid recommendation. He admitted, however, that the hearing examiner's application of the 90% time-served policy was the most likely explanation for the approximately 20-month disparity.

B. The Board's Discretion

Sullivan observed that, aside from the statutory

minimum threshold set forth under O.C.G.A. § 42-9-45(f), the Board is not bound by the 90% time-served policy, the hearing examiner's TPM recommendation, or any other calculations made by the hearing examiner. In fact, Sullivan asserted, in making his recommendation, the hearing examiner is "just doing math for the Board." He further testified that nothing prevents the Board from exercising its discretion, and that, in hundreds of cases, the Board has actually departed upward from the recommended TPM date resulting from the application of the 90% time-served policy. Additionally, Sullivan noted that even after the Board votes to approve a particular TPM date, the Board retains discretion to modify that date at any time, which it often does.

Masters, the Board's Director of Legal Services, likewise testified that the 90% policy is merely a "policy" that lacks the effect of law. Rather, she contended, the 90% time-served policy may be modified by the Board at any time, via a majority vote of its members. Masters argued that in enacting the policy, the Board simply wished to promulgate the manner in which it planned to exercise its discretion. The Board hoped to inform attorneys, judges, and criminal defendants of its intentions, and to dispel public misconceptions about Georgia's pardon and parole system.

Similarly, Baustin observed that the 90% time-served policy is "just another factor" the Board considers in making parole decisions. He noted that, irrespective of the hearing examiner's recommendation, the Board makes an individualized determination in each case.

On the other hand, on cross-examination, plaintiff elicited testimony from Sullivan indicating that, out of over 8,000 cases, the Board deviated downward from the 90% time-served policy only 10 or 11 times. Further, the Board apparently deviated downward in those 10 or 11 cases

because of extraordinary circumstances (i.e., where the inmates at issue had rendered substantial assistance to prosecutors). Although Masters had similarly contended that the Board's broad discretion vitiated the importance of the 90% time-served policy, she admitted on cross examination that the Board follows the hearing examiner's TPM recommendation "all the time," perhaps in as many as 80% of the cases the Board reviews.

C. Reconsideration of the Board's TPM Notice

After the Board votes to accept or deny the TPM recommendation submitted by the hearing examiner, the Board notifies the inmate of its decision via a "Parole Decision Guidelines--Notice of Tentative Action" (Parole Decision Guidelines). Said notice includes, inter alia, the Board's TPM recommendation, the months-to-serve calculation generated from the Guidelines Grid, and the cumulative Parole Success Likelihood Score. Further, the notice indicates that "[a]ll decisions made by the Board are tentative and may be changed at the discretion of the Board at any time." At this point, the inmate may request that the Board reconsider his recommended TPM date.

Baustin, who personally reviewed plaintiff's request for reconsideration, testified that in his 23 years of employment with the Board, he has reviewed approximately 1,200 TPM "appeals" per year. Further, Baustin indicated that he has deviated from the Board's TPM decision, and recommended a different TPM, in approximately 20% of those cases. Baustin was unable to determine whether the TPM deviations within that 20% reflected months-to-serve increases, or months- to-serve decreases, but he reiterated that the Board ultimately has discretion to adjust the recommended TPM date in either direction.

When asked by the court whether, on reconsideration,

the hearing examiner was authorized to deviate from the Guidelines Grid calculations, Baustin explained that the hearing examiner may include "comments" with his recommendation (Def.'s Ex. 6). Baustin noted that the hearing examiner's TPM recommendation is not always "strictly by the grid," but that all of the pertinent Guidelines Grid figures are provided to the Board for review. Further, Baustin testified that the hearing examiner may include a "policy" recommendation in his submission to the Board.

On the other hand, Baustin's testimony also disclosed that the TPM "appeal" process is somewhat of a misnomer. In practice, the hearing examiner who reviews the inmate's request for reconsideration will not re-calculate the inmate's TPM, re-submit the inmate's parole eligibility data to the Board, or otherwise adjust the inmate's TPM date in any way absent a mathematical error warranting reconsideration. The "reconsideration" process may thus be more accurately described as a request for a TPM "recomputation." Moreover, Baustin asserted that the initial hearing examiner's application of the 90% time-served policy to calculate an inmate's TPM date, and the Board's subsequent acceptance of the examiner's recommendation, is not the sort of "error" warranting recomputation. Rather, according to Baustin, requests for reconsideration filed on this basis are summarily denied by the hearing examiners, ending the review process.

The typical errors Baustin encounters pertain to miscalculated Crime Severity Levels and Parole Success Likelihood Scores, and erroneous applications of the Board's 90% time-served policy (i.e., where the inmate's underlying offense does not fall within the group of offenses covered under the policy). Baustin discovers such errors in approximately 10% of the 30 requests for reconsideration he reviews each week. Even where computation errors are discovered, however, the hearing examiner will not re-submit a case to the Board for reconsideration if the case

falls under the 90% time-served policy.[2]

Finally, with respect to plaintiff's requests for reconsideration, Baustin observed that he personally denied plaintiff's requests on January 18, 2001 and February 17, 2001. Baustin asserted that, the Board having accepted the initial hearing examiner's 90% time-served recommendation, he saw no reason to depart from the TPM date at issue. Rather, Baustin testified, the Board would not likely have reconsidered its decision anyway. Baustin noted that although the Board has not made any official declaration to him indicating that the application of the 90% time-served policy is mandatory, the Board has "made it clear that ... [it] would not reconsider the 90% policy" in the TPM "appeal" context.

D. Plaintiff's Parole Success Likelihood

As to the likelihood that plaintiff would have received an earlier TPM but for the Board's application of the 90% time-served policy to his offense, Masters indicated that, in her opinion, such a result was unlikely. Rather, she testified that plaintiff's sentence was unusually short in proportion to the severity of his offense, that the recommendations generated from the Guidelines Grid do not bind the Board, and that irrespective of the adoption of the challenged policy, the Board could have required plaintiff to "max out," or serve his entire 5-year term of incarceration. In Masters' opinion, plaintiff's court-imposed prison sentence was unusually short in relation to similar offenses because the sentencing judge was probably aware of the Board's 90%

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[2] Presumably, Baustin meant that such reconsideration would not take place, as a general rule, because the TPM date generated by the 90% time-served policy typically exceeds the Guidelines Grid recommendation.

time-served policy and considered the policy in rendering his sentence.

Utilizing incarceration data for aggravated assault offenders in the Georgia prison system, Sullivan also testified that, in his opinion, plaintiff's sentence was lighter than one might expect given the victim's injuries, plaintiff's use of a weapon, his prior criminal record, and his flight from the police (Def.'s Ex. 12). Further, Sullivan's testimony indicated that the average periods of incarceration imposed by the State of Georgia upon relevant aggravated assault offenders decreased slightly from 1996 (6.5 years imposed) through 2000 (5.9 years imposed), while the average time-served for such offenders increased slightly during the same period (from 2.9 years served in 1996 to 3.2 years served in 2000) (Def.'s Ex. 12). Thus, these statistics arguably corroborated Masters' contention that plaintiff received a lighter sentence because of the Superior Court's awareness of the 90% time-served policy. Yet, Sullivan also acknowledged that plaintiff received the maximum statutory sentence of 20 years, with 5 years to serve, and that plaintiff's "good work history" would have been considered at sentencing.

III. Plaintiff's Motion for Equitable Judgment

A. 42 U.S.C. § 1983

To articulate a cognizable claim under 42 U.S.C. § 1983, "plaintiff must show that a person, acting under color of any statute, ordinance, regulation, custom, or usage, deprived him of a right, privilege, or immunity secured by the Constitution." Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth., 112 F.Supp.2d 1320, 1328 (N.D.Ga.2000). Plaintiff's § 1983 claim is rooted in the Board's alleged violation of plaintiff's rights under the Ex Post Facto Clause of the United States Constitution [1-1].

See U.S. Const. Art. I, § 10, cl. 1. The alleged violation stems from the Board's retroactive enforcement of its 90% time-served policy against plaintiff, thus the Board may fairly be characterized as "acting under color" of state law within the meaning of § 1983. 42 U.S.C. § 1983.

B. Analysis of Plaintiff's Ex Post Facto Claim

1. Ex Post Facto Standard

To prove that a retroactively applicable parole board procedure violates the Ex Post Facto Clause, a prisoner must show that the challenged action "creates a significant risk of prolonging [his] incarceration." Garner v. Jones, 529 U.S. 244, 251 (2000). In two recent opinions, one of which originated in this very district, the United States Supreme Court suggested that a retroactive amendment postponing a prisoner's initial parole eligibility date would offend the constitutional ban on Ex Post Facto legislation. See Garner, 529 U.S. at 250-51 (2000); California Dep't of Corrections v. Morales, 514 U.S. 499, 511 (1995). Additionally, nearly thirty years ago the Supreme Court observed that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the Ex Post Facto clause [citations omitted] of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the ... offense.'" Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 663 (1974) (emphasis added) (quoting Rooney v. North Dakota, 196 U.S. 319, 325 (1905)). That same Supreme Court cited, with apparent approval, a decision of the United States Court of Appeals for the Ninth Circuit holding that "[u]nder California law, a convicted person's eligibility for parole consideration (as opposed to parole) is part of the 'law annexed to the crime when committed' ... and any legislative change in such eligibility which would work to a prisoner's disadvantage may not be retroactively applied." Love v.

Fitzharris, 460 F.2d 382, 383 (9th Cir.1972), vacated on other grounds, 409 U.S. 1100 (1973). See also Akins v. Snow, 922 F.2d 1558, 1563 (11th Cir.1991), cert. denied, 501 U.S. 1260 (1991) (opining that the Ex Post Facto Clause "applies to a change in parole eligibility" because "parole eligibility must be considered part of any sentence....").

Nevertheless, the Supreme Court has declared that there is no "simple formula" for determining whether official rules or procedures violate the Ex Post Facto Clause. Garner, 529 U.S. at 252. Rather, in the pardons and paroles context, the inquiry ultimately boils down to whether, in light of all of the relevant facts and circumstances, the prisoner can show "through evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than [he would have received] under the earlier rule." Id. at 255. To make such a showing, the inmate need not prove "that he definitely would have served a lesser sentence under the previous legal regime," Jones v. Georgia State Board of Pardons & Paroles, 59 F.3d 1145, 1149 (11th Cir.1995) (emphasis omitted) (citing Miller v. Florida, 482 U.S. 423, 432 (1987)), only that the challenged procedure creates a "sufficient risk" of doing so. Morales, 514 U.S. at 509.

To inform this analysis, courts should examine the parole board's internal policy statements, for "[a]t a minimum, policy statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether ... the amendment [at issue] ... create[s] a significant risk of increased punishment." Garner, 529 U.S. at 256. Further, such "policies and practices will indicate the manner in which [the Board] is exercising its discretion." Id.

Ex Post Facto Clause analysis also requires courts to

gauge the level of discretion actually exercised by the parole board in question. For example, both Garner v. Jones, 529 U.S. 244, and Jones v. Georgia State Board of Pardons & Paroles, 59 F.3d 1145, involved ex post facto challenges to certain parole eligibility procedures that were retroactively enforced by Georgia's State Board of Pardons & Paroles, the defendant in the instant litigation. The Garner court examined a Board rule that retroactively decreased the frequency, from three years to eight years, with which prisoners serving life sentences would be granted parole reconsideration hearings after an initial denial. See Garner, 529 U.S. at 247. In Jones, a Georgia inmate sought to enjoin the enforcement of a Board rule that retroactively required "Level V" offenders to serve the greater of either (1) the recommended months-to-serve from the Guidelines Grid; or (2) one-third of the court-imposed sentence of incarceration, before being eligible for parole. 59 F.3d at 1148. Previously, only the more serious "Level VI" and "Level VII" offenders were subject to the one-third time-served requirement; "the TPM of prisoners with [Crime Severity Levels] of I through V was determined, prior to any discretionary departure, solely by reference to the [Guidelines Grid]." Id. at 1147.

Although the United States Court of Appeals for the Eleventh Circuit had found, in Garner, that the challenged rule violated ex post facto, the Supreme Court ultimately reversed and remanded for further findings on grounds that the Eleventh Circuit failed to evaluate whether the rule actually posed a sufficient risk of increasing the inmate's punishment. See Garner 529 U.S. at 255. Specifically, the Supreme Court could not determine, from the record before it, whether the Board's discretion to grant a parole reconsideration hearing during the eight-year interval in which no hearing was due, or the Board's discretion to grant expedited reconsideration hearings in the event of a change in circumstances, vitiated the underlying ex post facto concerns. See id.

Likewise, the "undisputed fact" that the Board "retained and in fact exercised virtually unfettered discretion to deviate both above and below the Guidelines-recommendation in setting the TPM" was the key to the Eleventh Circuit's decision in Jones. 59 F.3d at 1149. Affirming the district court's conclusion that the Board's retroactive extension of the one-third time-served requirement to Level V offenders did not violate the Ex Post Facto Clause, the Eleventh Circuit opined that "the degree of the Board's continuing parole discretion implies that the TPM rule change 'create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes....'" Id. (quoting Morales, 514 U.S. at 500).

Finally, several federal decisions suggest that a challenged parole eligibility method, policy, or procedure need not necessarily take the form of a law, rule, or regulation to implicate the Ex Post Facto Clause. See, e.g., Garner, 529 U.S. at 255 (opining that ex post facto plaintiff must show that the rule has the effect of retroactively increasing his punishment); United States v. Adeleke, 968 F.2d 1159, 1160 (11th Cir.1992) (opining that the retroactive use of an application note to the federal sentencing guidelines, lacking "the force of law," cannot be deemed to have "changed the law" for ex post facto purposes.); Akins, 922 F.2d at 1561 (11th Cir.1991) (opining that the rules and regulations of the Board, a quasi-legislative entity, implicate ex post facto because they have the force and effect of law); Dufresne v. Baer, 744 F.2d 1543, 1550 (11th Cir.1984) (opining that the federal parole guidelines lacked "the characteristics of law ... They are not filed and rigid, but are flexible" and, therefore, did not violate the Ex Post Facto Clause); United States ex rel. Graham v. United States Parole Comm'n, 629 F.2d 1040, 1043 (5th Cir.1980) (opining that any "official post-sentence action that delays eligibility for

supervised release runs afoul of the ex post facto proscription."); Warren v. Baskerville, 233 F.3d 204, 208 (4th Cir.2000) (opining that a retroactive parole "policy" change "did not for ex post facto purposes have the force and effect of law."); Hill v. Jackson, 64 F.3d 163, 169-70 (4th Cir.1995) (opining that parole reconsideration "policy" did not violate ex post facto because application of the policy was not "automatic," appeals were permitted, and the policy did not affect standards for initial parole consideration); Hamm v. Latessa, 72 F.3d 947, 957 (1st Cir.1995) (observing, in dicta, that a retroactively applicable parole policy would constitute a "law" within the meaning of the Ex Post Facto Clause if it "possess[ed] the full force and effect of law...."); Geraghty v. U.S. Parole Commission, 579 F.2d 238, 267 (3d Cir.1978), vacated on other grounds, 445 U.S. 388 (1980) (noting that parole "guidelines" would violate ex post facto if applied in a fixed and mechanical way); Love, 460 F.2d at 385 (9th Cir.1972) (opining that a parole board's retroactive interpretation of a parole eligibility provision was subject to ex post facto constraints because the interpretation had the effect of law); Oglesby v. Ray, 8 F.Supp.2d 1379, 1380 (N.D.Ga.1998) (Thrash, J .), rev'd on other grounds, 180 F.3d 272 (11th Cir.1999) (applying ex post facto analysis to a retroactive parole board "policy").[3] Rather, as

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[3] In Oglesby v. Ray, the district court initially determined that the challenged parole reconsideration "policy" withstood ex post facto scrutiny because it did not create a sufficient risk of retroactively increasing the inmate's punishment. See 8 F.Supp.2d at 1383. The United States Court of Appeals for the Eleventh Circuit subsequently reversed and remanded the case for further consideration in light of its intervening decision in Jones, 59 F.3d 1145. See Oglesby v. Ray, No. 1:97-CV-527-TWT (N.D. Ga. order filed on April 23, 1999 [19-1]). On remand, the district court found the policy violative of the Ex Post Facto Clause [26-1]; however, the Eleventh Circuit once

noted, ex post facto considerations apply in the parole eligibility context to any official policy or procedure that has the full force and effect of law, and whose practical implementation produces a "sufficient risk" of retroactively lengthening the inmate's period of incarceration. Morales, 514 U.S. at 509.

2. Plaintiff's Challenge to the Board's 90% Time-Served Policy

Plaintiff contends that under the guidelines in effect when he committed his crime, he would have been entitled to an initial parole eligibility hearing on or about August 23, 2000, after having served twenty months of his five-year prison term (Pl.'s Mot. for Equitable J. at 3).[4] But for the Board's retroactive application of its 90% time-served policy to his offense, he argues, the relevant hearing examiner would have recommended a TPM date based upon service of one-third of his court-imposed prison sentence, see O.C.G.A. § 42-9-45(f); the Board would have simply adopted said recommendation as a matter of routine practice; and plaintiff

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again reversed the ruling in light of the intervening decision of the United States Supreme Court in Garner, 529 U.S. 244 [31-1]. Finally, on November 6, 2001, the district court ultimately dismissed the inmate's action as moot, given the Board's voluntary cessation of the application of the challenged policy [36-1]. Accordingly, the Eleventh Circuit never specifically addressed whether the district court properly treated the challenged "policy" as a "law" for ex post facto purposes.

[4] Plaintiff contends that he is entitled to credit for time served towards his August 4, 1999 sentence (217 days of pre-trial confinement) (Compl.¶ 7).

would likely have been paroled on or about the adopted TPM date, given that the Guidelines Grid rated his chance of parole as "excellent." Instead, he claims, the Board rigidly enforced its 90% time-served policy against him, retroactively extending his TPM date from August 23, 2000 to June of 2003, and increasing the length of his confinement by approximately 34 months (Pl.'s Mot. for Equitable J. at 3).

According to the evidence presented at the April 10, 2002 hearing, however, plaintiff's position is not entirely accurate. Rather, the testimony of Sullivan and Baustin established that hearing examiners are instructed to recommend the lengthiest number of months-to-serve under the guidelines. Additionally, the Guidelines Grid indicates that, "[f]or certain Crime Severity Level V, VI, and VII offenses, the Guidelines recommendation will be one-third of the court-imposed sentence length or the grid recommendation, whichever is greater" (Guidelines Grid (emphasis omitted)). Accordingly, even if the 90% time-served policy did not apply to plaintiff's offense, the Board would likely have adopted the 34 months-to-serve recommendation, it being the lengthier of the recommendations generated from the Guidelines Grid (34 months) and the one- third requirement (20 months). Therefore, plaintiff could have at best expected a TPM date of October 2001 (34 months), rather than June 2003 (54 months).

Nevertheless, the approximately 20-month disparity about which plaintiff complains is not to be taken lightly. If the Board has inflexibly enforced its 90% time-served policy against plaintiff, such that its application has the force and effect of law, then the Board has created a risk of retroactively increasing his punishment. Further, if plaintiff would likely have been paroled sooner than June 2003 but for the Board's allegedly unconstitutional action, then said

risk is "sufficient" to render the policy violative of the Ex Post Facto Clause. Morales, 514 U.S. at 509.

After careful review and consideration, the court answers both of these questions in the affirmative. The testimony presented to the court on April 10, 2002 established that although the Board is authorized to exercise discretion, and that the TPM recommendations are merely "recommendations" that remain "tentative" even after the Board votes to accept them, the Board does not in fact exercise any meaningful discretion in cases falling under its 90% time- served policy. Rather, the 90% time-served policy serves as an inflexible benchmark below which the Board almost never deviates. The statistical evidence, the procedures in effect, the text of the resolution itself, and the Board's internal policy statements and guidelines provide overwhelming evidence, both direct and circumstantial, of this fact.

a. The Practical Implementation of the 90% Policy

The evidence presented at the April 10th hearing indicated that, from January 1, 1998 through June 30, 2001, the Board deviated below the 90% threshold in exactly 10 cases out of 8,664 (Def.'s Ex. 8). Because each of those cases involved highly unusual circumstances, however, the number of downward deviations really amounts to zero. Application of the 90% time-served policy is virtually automatic; the TPM calculation generated by the 90% time- served policy will inevitably reflect the highest number of months-to-serve submitted to the Board, a figure that the Board will always adopt. Thus, the change in the TPM formula at issue in this case is a far cry from the change examined by the Eleventh Circuit in Jones, where the court determined that the Board "retained and in fact exercised virtually unfettered discretion to deviate both above and below the Guidelines-

recommendation in setting the TPM." Jones, 59 F.3d at 1149. Here, by contrast, the Board exercises unwavering adherence to the challenged 90% benchmark.

The TPM "reconsideration" process is further evidence that the Board blindly applies the 90% time-served policy. In truth, the hearing examiner who conducts this purely "paper" review exercises no discretion with respect to 90% cases. Unless an initial hearing examiner erroneously calculates the inmate's TPM date under the 90% time-served policy, when in fact the inmate's offense does not fall under that policy, hearing examiners will not re-submit recommendations to the Board even if the initial recommendations contain mathematical errors. He alone makes this decision, unilaterally ending the review process without any adversarial hearing or meaningful reconsideration.

b. The Board's Internal Policy Indicators

Likewise, the Board's December 9, 1997 resolution adopting the challenged policy, as well as the Board's related guidelines and policy statements, serve as circumstantial evidence that the 90% time-served policy is applied mandatorily. The pertinent text of the resolution provides:

> WHEREAS: Since 1991, the Board has steadily and consistently amended and refined its guidelines to provide for lengthier time-served for violent and dangerous criminals while reducing the overall number of individuals released on parole; and,
>
> WHEREAS: The Board believes that a further amendment to its statutorily mandated guidelines will further enhance public safety and make Georgia the toughest state in the

> nation for "time-served" for violent felonies and residential burglaries;
>
> THEREFORE: Be it now hereby resolved by the [Board] that its statutorily mandated guidelines are hereby amended to provide that any offender who is convicted on or after January 1, 1998, of one or more of [20 enumerated offenses, including aggravated assault] ... will be required to serve a minimum of 90% of the court imposed term of incarceration in prison.

(90% time-served policy at 1). This language clearly expresses the Board's intent to lengthen the actual time certain inmates serve in prison, "mak[ing] Georgia the toughest state in the nation" in this regard, and declares that, with respect to covered offenders, service of a minimum of 90% of the court- imposed term of incarceration "will be required " (90% time-served policy at 1 (emphasis added)).[5]

The policy statement published on the Board's internet home page similarly declares that "[t]he Board requires all violent offenders ... to serve a minimum of 90 percent of their court-imposed terms of incarceration." State of Georgia Board of Pardons & Paroles, "90-Percent Policy," Parole Consideration and Eligibility (www.pap.state.ga.us/eligibility.html, visited on May 2, 2002) (emphasis added). Finally, the text accompanying the

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[5] Notably, in reviewing the parole procedures at issue in *Garner*, the Supreme Court declared: "Absent a demonstration to the contrary, we *presume* the Board follows its ... internal policies in fulfilling its obligations." 529 U.S. at 256 (emphasis added).

Guidelines Grid indicates:

> "Board's 90% Resolution: Pursuant to Board policy, for persons CONVICTED on or after January 1, 1998, the Guidelines recommendation will be 90% of the court-imposed prison sentence or the Grid recommendation, whichever is greater....

(Guidelines Grid). In each of these examples, no discretion is implied. Instead, the Board's language is unambiguously mandatory, further supporting plaintiff's contention that the Board's enforcement of the 90% time-served policy has the force and effect of law for ex post facto purposes.

c. Plaintiff's Parole Success Likelihood

Given this determination, the challenged action violates the Ex Post Facto Clause if there is a substantial likelihood that plaintiff would have been paroled earlier had the Board not retroactively enforced its 90% time-served policy against him. As noted, the Guidelines Grid rates the range within which plaintiff's 14-point Parole Success Likelihood Score falls as "excellent." Yet, both Masters and Sullivan opined that plaintiff would not likely have been paroled even if the 90% time-served policy did not apply to his offense. Masters and Sullivan explained that, in their opinion, the Superior Court sentenced plaintiff to an unusually light term of confinement, anticipating that the Board would require plaintiff to serve at least 90% of it. Thus, they argued, the Board would not likely have recommended an October 2001 TPM even without the 90% requirement.

The statistical evidence presented at the April 10th hearing nonetheless established that although plaintiff received a shorter than average prison term, his term (5

years) was shorter than average as compared to all non-life aggravated assault sentences imposed during 1998 (6.3 years), a year in which Superior Court judges would have been aware of the new 90% requirement (Def.'s Ex. 12). It is fair to infer, therefore, that the sentencing court imposed a shorter than average term not because of its awareness of the 90% requirement, but because it did not regard plaintiff's crime as particularly egregious as compared to other aggravated assaults. Further, the court notes that plaintiff's June 2003 TPM would require him to serve 54 months, or 4.5 years, a prison term that greatly exceeds the average time-served attributable to all aggravated assault offenders released from 1996 through 2001 (Pl.'s Ex. 6 at 3; Def.'s Ex. 12). The court cannot reconcile this fact with plaintiff's 34-month grid score and his parole success rating of "excellent" without concluding that plaintiff would likely have received an earlier TPM date but for the Board's retroactive application of the 90% time-served policy. Accordingly, plaintiff has made the requisite showing of unconstitutionality under the Ex Post Facto Clause.

IV. Prerequisites for Injunctive Relief

To prevail on a motion for injunctive relief, a plaintiff must establish the following four factors: (1) actual success on the merits; (2) a threat of irreparable injury; (3) that plaintiff's own injury would outweigh the injury to defendant; and (4) that an injunction would not disserve the public interest. See Tefel v. Reno, 180 F.3d 1286, 1295 (11th Cir.1999); Spottsville v. Barnes, 135 F.Supp.2d 1316, 1318 (N.D.Ga.2001) (citing Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n. 12 (1987)). See also Siegel v. LePore, 234 F.3d 1163, 1213 (11th Cir.2000) (Carnes, J., dissenting). With respect to plaintiff's ex post facto claim, the court concludes that plaintiff's showing justifies the injunctive relief he seeks. Accordingly, plaintiff's motion for equitable judgment is hereby **GRANTED** [7-1].

IV. Conclusion

Having determined that the Board's retroactive enforcement of its 90% time- served policy against plaintiff is unconstitutional and invalid for the reasons set forth herein, plaintiff's motion for equitable judgment is hereby **GRANTED** [7-1]. Defendant State Board of Pardons & Paroles, its officers, agents, servants, employees, attorneys, and all persons acting in concert or participation with the State Board of Pardons & Paroles who receive actual notice of this order by personal service or otherwise, are hereby **RESTRAINED** and **ENJOINED** from taking any actions of any kind, legal or otherwise, to carry out, assert and/or enforce the 90% time-served policy as it relates to this individual--plaintiff Coleman Jackson. Defendant is hereby **ORDERED** to provide plaintiff with an initial parole eligibility hearing within **FORTY-FIVE (45) DAYS** of the issuance of this order. Further, defendant is hereby **ORDERED** to consider plaintiff's parole eligibility without regard to the 90% time-served policy. To the extent that plaintiff's counsel has moved for an order directing plaintiff's immediate release from custody, said motion is hereby **DENIED**. Nevertheless, the court will reconsider plaintiff's request if defendant fails to comply with this order.

IT IS SO ORDERED, this 29th day of May, 2002.

s/ William C. O'Kelley

William C. O'Kelley
Senior United States District Judge